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A High Price to Compete: The Feasibility and Effect of Waivers Used to Protect Schools From Liability for Injuries to Athletes With High Medical Risks

Andrew Manno
University of Kentucky

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INTRODUCTION

Americans are fanatic about sports. A phenomenon called "funkionlust,"[1] or the "love of doing a thing," has accompanied this fanaticism. As a result, athletes often will risk their own health and safety in order to compete in their favorite sport. But "funkionlust" is not the only motivation athletes feel to participate. Economic considerations, institutional pressures, pride, and peer pressure[2] may all lead athletes to pursue athletic competition, ignoring potential harm to themselves.[3]

The story of Hank Gathers illustrates the desire athletes feel to participate in their chosen sport. Gathers, a basketball star at Loyola Marymount University, fainted during a game early in the 1989-90 season. He was diagnosed as having an irregular heartbeat. Gathers loved basketball and continued to play despite the danger concomitant to his condition. In March of 1990, he collapsed during a basketball game and died.[4]

Athletes who have been advised by doctors not to compete due to serious medical conditions may attempt to persuade their schools to allow them to compete regardless of the risk. Such athletes, and even their parents, may offer to sign a liability waiver in an attempt

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[1] Crile, *The Surgeon's Dilemma*, Harper's, May 1975, at 38.

[2] *See* Dodd, Who Decides Health Risk is Too High?, USA Today, Oct. 5, 1990, at 1C, col. 3 [hereinafter USA Today] (discussing Stephen Larkin's attempt to play high school football despite warnings that his heart condition could endanger his life); *see also* Garrity, *You Name It, They Play It*, Sports Illus., May 13, 1985, at 62 (discussing the Larkin brothers, three of whom were major college athletes and noting that a former Notre Dame football coach called then twelve year old Stephen the best athlete in the family).

[3] King, *The Duty and Standard of Care for Team Physicians*, 18 HOUS. L. REV 657, 693 (1981).

[4] Smith, *Not What the Doctor Ordered*, Sports Illus., June 11, 1990, at ____

to absolve the school of any responsibility if the athlete is further injured.[5]

This situation creates a dilemma for the schools or school districts involved. One option for the school is to accept the liability waiver and allow the athletes to ignore medical recommendations and risk serious injury by participating in athletic competition. If, however, the school or school district allows the student to play under a waiver, there is no guarantee that the waiver will fully protect the school if the athlete is injured.[6] The alternative is to refuse to allow the athlete to participate despite the waiver offer and face the possibility of legal action from the disgruntled student.[7]

By allowing athletes to compete despite expert determinations that their medical conditions should preclude such competition, the schools are exposing these athletes to grave and potentially fatal risks of injury.[8] Additionally, the schools are exposing themselves to possible litigation and liability [9]

Part I of this Note discusses the concept of waivers, what may be found in the agreements, and how waivers relate to athletic participation.[10] Part II looks at the various ways waivers can be voided, including public policy reasons, repudiation by a minor, or use of ambiguous terms.[11] Part III examines the factors that should be considered when deciding whether to allow an athlete to

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[5] Stephen Larkin and his parents provide an example. Stephen, a seventeen year old, was prevented from playing high school football in the fall of 1990 due to a heart condition known as hypertrophic cariomyopathy, or thickening of the heart muscle. The family was willing to sign a waiver of liability even though all six cardiologists who examined the case recommended that Stephen Larkin not play football. The United States Court of Appeals affirmed a U.S. District Court decision denying the Larkin family request for a restraining order to force Stephen's school to allow him to play. Larkin v. Archdiocese of Cincinnati, No. 90-3893 (6th Cir. 1990); *see also* Smith, *supra* note 4 (examples of other athletes willing to sign liability waivers in order to play).

[6] H. APPENZELLER, SPORTS & LAW 35 (1985); *see infra* notes 28-65 and accompanying text.

[7] *See* USA Today, *supra* note 2; *see also* Grube v. Bethlehem Area School Dist., 550 F Supp. 418 (E.D. Pa. 1982) (athlete with one kidney successful in enjoining school from precluding him from playing interscholastic football after the school had rejected the athlete's offer to sign a written waiver of all legal or financial responsibility of the school in the event of injury).

[8] *See infra* notes 61-105 and accompanying text.

[9] *See* Smith, *supra* note 4 (discussing the types of litigation initiated by athletes who offer to sign liability waivers and the fear that the waivers will not hold up in court); *see also infra* notes 28-65 and accompanying text.

[10] *See infra* notes 14-24 and accompanying text.

[11] *See infra* notes 28-65 and accompanying text.

participate, such as the rights as well as the health and safety of the athlete.[12] Waivers serve a valuable function by informing the athlete of the risks of the activity in which she wishes to participate. But if the school considers what is in the best interest of the athlete and examines its own potential liability, it must conclude that it should not allow athletes that have serious medical problems to participate. Athletes do not always act in their own best interest; it sometimes falls to the school to insure a fatal mistake is not made by the athlete or her parents.[13]

I. WAIVERS

A waiver is an exculpatory agreement that relieves one party of all or part of its responsibility to another.[14] These waivers, usually in the form of an express contractual agreement,[15] touch off a conflict between contract law and tort law [16] Contract law is

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[12] *See infra* notes 61-103 and accompanying text.

[13] *See id.*

[14] H. APPENZELLER, *supra* note 6, at 34.

[15] A typical waiver looks like this:

> I am aware that participation in this sport will be a dangerous activity involving MANY RISKS OF INJURY. I understand the dangers and risks of participating include, but are not limited to, death, serious neck or spinal injury, which may result in paralysis, brain damage, serious injury to all internal organs, injury to all bones, ligaments, muscles, tendons, and other aspects of my body. I understand the dangers and risks of playing or practicing may result not only in serious injury, but in serious impairment of future ability to earn a living, engage in business, and generally enjoy life.
>
> Because of the dangers of the sport, I understand the importance of following the coaches' instructions regarding techniques, training and other rules and agree to obey instructions.
>
> In consideration for allowing me to participate, I hereby assume all the risks associated with the sport and agree to hold the school district, its employees or agents harmless from any and all liability, causes of action, debts, claims, or demands of any nature whatsoever which may arise in connection with my participation in any activities related to the team. The terms hereof serve as a release and assumption of risk for my heirs, estate, and for all members of my family.
>
> I, as the parent/legal guardian, have read the above warning and release and understand its terms. I understand the sport involves many risks, including but not limited to those outlined above.
>
> In consideration for the school district permitting my child to try out for and ultimately participate with the team, I hereby agree to hold the school district, its employees and agents harmless from any liability which may arise in connection with participation of my child in activities related to the team. The terms serve as a release.

2 R. BERRY & G. WONG, LAW AND BUSINESS OF THE SPORTS INDUSTRIES 414 (1986).

[16] H. APPENZELLER, *supra* note 6, at 34.

based on the premise that persons should be able to make a binding agreement as they see fit.[17] Tort law, on the other hand, is based on the idea that a party should be held responsible for his wrongful actions that cause injury to others.[18] This conflict has led to some confusion regarding the validity of waivers in situations such as those discussed here.[19]

Courts have attempted to resolve this conflict through a general principle that waivers will be enforced unless the agreement is invalid as contrary to public policy[20] or one party was clearly dominant in the bargaining process.[21] But courts do not look favorably upon these exculpatory agreements.[22] Other factors also may lead to a waiver being voided,[23] including the fact that one of the parties is a minor, a finding of fraud or misrepresentation, or the existence of force or duress.[24]

When waivers are used in an attempt to protect schools from liability for injuries suffered by students in athletic competition, they generally include a statement that the athlete is aware of the risks of participation and assumes these risks. If a specific risk is known, or if the athlete has a particular medical condition, this is commonly specified in the waiver There will be a statement in the waiver releasing the school or school district of all liability arising from the particular risk or condition.[25] The waiver also will include

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[17] *Id.*

[18] *Id.*, *see* W KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 6 (5th ed. 1984).

[19] G. NYGARD & T. BOONE, LAW FOR PHYSICAL EDUCATORS AND COACHES, 220 (1989).

[20] RESTATEMENT (SECOND) OF TORTS § 469(b); *see also infra* notes 28-51 and accompanying text; Wagenblast v. Odessa School District, 758 P.2d. 968 (Wash. 1988) ("It has been much easier for courts to simply declare releases violative of public policy than to state a principled reason for so holding.").

[21] G. NYGARD & T. BOONE, *supra* note 19, at 225.

[22] *Id.*

[23] *See* G. SCHUBERT, R. SMITH & J. TRENTADUE, SPORTS LAW 218, 219 (1986).

[24] *See infra* notes 52-60 and accompanying text.

[25] Such a specific waiver might look as follows:

> I have been informed that I have the following physical conditions.
>
> I have received a full explanation from the physician that to continue to play may result in the deterioration or aggravation of such pre-existing physical condition and render me physically incapacitated.
>
> I fully understand the possible consequences of playing with the physical conditions set forth above. Nevertheless, I desire to continue to play and hereby assume the risk.
>
> Because I desire to play, I hereby waive and release the school, coaches, the school physician and its trainers from any and all liability in the event I become physically unable to play because of a deterioration or aggravation of the physical condition set forth above.

2 R. BERRY AND G. WONG, *supra* note 15, at 405.

the signature of the athlete and the signature of the athlete's parent or guardian, if she is a minor. Whether or not the waiver will be effective in protecting the school from liability,[26] it is a method of informing the athlete of the dangers of participation in an athletic activity [27]

II. REASONS FOR THE VOIDING OF ATHLETIC PARTICIPATION LIABILITY WAIVERS

A. Waivers Void as Contrary to Public Policy

Liability waivers may be declared void as contrary to public policy because "the public interest may not be waived."[28] In *Tunkl v Regents of University of California*,[29] the California Supreme Court designed a test to determine when an exculpatory agreement violates public policy. The test consists of six criteria: (1) the agreement concerns an endeavor of a type generally thought suitable for public regulation; (2) the party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public; (3) such party holds itself out as willing to perform this service for any member of the public who seeks it, or at least for any member of the public coming within certain established standards; (4) the party seeking the exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks the services; (5) in exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract[30] of exculpation and makes no provision whereby those receiving services may pay additional reasonable fees and obtain protection against negligence; and (6) the person or members of the public seeking such services must be placed under the control of the furnisher of the services, subject to the risk of carelessness

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[26] *See infra* notes 28-65 and accompanying text.

[27] *See* E. Bjorkum, *Assumption of Risk and Its Effect on School Liability for Athletic Injury*, 55 EDUC. L. REP. (WEST) 349, 358 (Oct. 26, 1989).

[28] *See* 28 AM. JUR 2D *Estoppel and Waiver* § 161 (1964); KEETON, *supra* note 18, at 482.

[29] 32 Cal. Rptr. 33, 383 P.2d 441 (1963).

[30] An adhesion contract is a standardized contract offered on an essentially "take it or leave it basis," without opportunity to bargain and under such conditions that the consumer cannot obtain the desired service without agreeing. BLACK'S LAW DICTIONARY 38 (5th ed. 1979).

on the part of the furnisher, its employees, or its agents.[31] All of these factors were present in the *Tunkl* case.[32]

In *Wagenblast v Odessa School District*,[33] the *Tunkl* test was applied to waivers releasing a school district from liability stemming from athletic programs. The Seattle and Odessa school districts had required all students and their parents or guardians to sign standardized waiver forms as a precondition to the students' participation in athletic activities. The Supreme Court of Washington held that the requirement was impermissible because the waivers violated public policy [34] The court found all of the criteria of the *Tunkl* test present.[35] It said that (1) interscholastic sports in public schools are a subject fit for public regulation; (2) interscholastic sports in public schools are a matter of public importance; (3) interscholastic sports programs are open to all students who meet certain skill and eligibility requirements; (4) school districts possess a clear and disparate bargaining strength when they insist the waiver be signed; (5) any student that refuses to sign the waiver will be barred from participation in interscholastic sports in public schools; and (6) a school district owes a duty to its students to anticipate reasonably foreseeable dangers.[36] In addition, the school district has a duty to take precautions to protect the students from those dangers, and the student, under the control of a coach, is subject to the risk that the school district or its agent will breach the duty [37] While the court did not assign weights to the six factors, it noted that as the number of factors present increases, the agreement is more likely to be declared invalid on public policy grounds.[38]

The *Wagenblast* court also discussed the relationship between the waivers and the doctrine of assumption of risk, concluding that the two are basically similar.[39] There may, however, be risks other than the school district's negligence present in any athletic activity [40] If a student knowingly encounters one of these risks and still

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[31] Tunkl v. Regents of Univ. of Cal., 32 Cal. Rptr. 33, 37-38, 383 P.2d 441, 445-46 (1963).

[32] *Tunkl*, 32 Cal. Rptr. 33, 383 P.2d at 441.

[33] Wagenblast v. Odessa School Dist., 758 P.2d 968, 971-73 (Wash. 1988).

[34] *See Wagenblast*, 758 P.2d at 970.

[35] *Id.* at 972-73.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 974.

[39] *Id.*

[40] *Id.* The court mentioned the possibility of the opponent's negligence and the inherent dangerousness of the sport as some of the risks, other than the school's negligence, that may be present.

decides to play, it might be said that the student has voluntarily assumed the risk.[41] The court cautioned that the facts of the case did not allow them to rule on that question.[42]

The court discussed the factors necessary to prove an express assumption of risk:[43] (1) a full subjective understanding, (2) of the presence and nature of the specific risk, and (3) a voluntary choice to encounter the risk. It is therefore possible that a court would apply the doctrine of assumption of risk, even though the waiver itself may be void as violative of public policy. In that case, the school would not be held liable.[44]

It is unclear how the *Wagenblast* decision might apply to a situation where a single athlete with a serious medical condition wishes to sign a liability waiver in order to participate in athletic competition. At least in Washington, there would be little problem meeting the first three criteria of the *Tunkl* test, as it was found that interscholastic sports are a fit subject for public regulation, are a matter of public importance, and are open to all students who meet certain eligibility requirements.[45] In addition, the sixth criterion also is met because the student is under the control of a coach and is subject to the risk that the duty the school owes to the athlete to anticipate reasonably forseeable dangers could be breached.[46]

In *Wagenblast*, all athletes were required to sign a liability waiver. In situations where only athletes with dangerous medical conditions must sign waivers, any difference in application of the *Tunkl* test would be in the fourth and fifth criteria of that test. The school still might hold a clear and disparate advantage in bargaining power, and could constructively force the student to sign the waiver.[47] As it is unlikely that the athlete can participate

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[41] *Id.*

[42] *Id.* The court said the law of assumption of risk continues to evolve on a case-by-case basis and that the facts before the court did not provide a basis to decide the question.

[43] *Id.* (citing Kirk v. Washington State Univ., 746 P.2d 285 (Wash. 1987)).

[44] Assumption of risk doctrine has serious limitations as a defense against liability. *See* E. Bjorkum, *supra* note 27, at 354-55.

[45] *Wagenblast*, 758 P.2d at 972.

[46] *Id.*

[47] The signing is constructively forced since the student will not be allowed to participate unless there is a signed waiver. *See* Smith, *supra* note 5 (Long Beach State football player and Central Connecticut State basketball player not allowed to compete unless waiver was signed).

in the sport elsewhere, the school still holds the kind of power discussed in the fourth and fifth parts of the *Tunkl* test.[48]

The waiver in a situation like this would not be standardized like the waiver in *Wagenblast*. It is not standardized in the sense that not all students are required to sign it in order to participate, but it may be standardized in the sense that all students with serious medical conditions sign the same waiver. The *Wagenblast* court said that not all of the criteria of the *Tunkl* test need be met to find a waiver violative of public policy [49] Instead, the analysis will be done on a case-by-case basis. The more criteria met, the greater the chance the waiver will be declared void as against public policy [50] The problem with this analysis is that the court does not weight the criteria or determine a minimum number of criteria necessary to declare the waiver void. There is also the question of how to weigh the various criteria.[51]

Under the *Wagenblast* interpretation of the *Tunkl* test, it is unclear how a waiver signed by one student that has a dangerous medical condition would hold up if attacked as void as against public policy The principle in *Wagenblast* and *Tunkl* appears to be the same. The decision may depend on the court that hears the case and the way it applies the *Tunkl* test to the situation. Perhaps the *Wagenblast* court would void a waiver signed by one medically unfit athlete since there is still uneven bargaining power, and the athlete has little choice but to sign in order to participate, even if the athlete volunteers to waive liability

B. Waivers Void for Other Reasons

In addition to public policy, there are other factors that may cause a waiver to be found void. One factor that is particularly pertinent to waivers of liability for interscholastic athletic participation is the contract principle that minors cannot be held to a contract and may repudiate an otherwise valid agreement.[52] Minors may repudiate an agreement because they do not have the maturity

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[48] *Wagenblast*, 758 P.2d at 973 (interscholastic competition possesses an "inherent allure" that outside alternatives do not possess; in addition, many students cannot afford private programs or schools where they may be able to compete).

[49] *Id.*

[50] *Id.*

[51] Note, *Negligence—Exculpatory Clauses—School Districts Cannot Contract Out of Negligence Liability In Interscholastic Athletics*, 102 HARV L. REV 729 (1989).

[52] H. APPENZELLER, *supra* note 6, at 35.

and knowledge to waive their right to hold the school district or coaches liable.[53] This factor is of obvious importance in interscholastic athletics as most of the participants in secondary school sports are minors.

Parents or guardians also are often required to sign these waiver agreements. Generally, parents cannot waive the right of their children to bring suit, although they may waive their own right to sue.[54] This principle renders the waivers signed by athletes who are minors effectively useless.[55]

A waiver also may be voided if there was fraud or misrepresentation within the agreement.[56] In determining whether fraud or misrepresentation exists, it is important to determine whether the waiving party had full knowledge of the terms of the agreement. The terms of the waiver must be conspicuous,[57] and the language must be specific and unambiguous in describing what liability is being waived.[58] The waiver must result from a free and open bargaining process.[59] Finally, waivers may be voided if force or duress was used to obtain a signature on a waiver, the waiver was unreasonable, or there was misconduct that was wanton, intentional, or reckless.[60]

If none of the above factors are present, then the waiver may be upheld.[61] This general proposition has been followed in cases where exculpatory clauses have been signed by athletic participants.[62]

Thus, it is clear that the mere presence of a liability waiver often may not preclude an athlete from obtaining a judgment

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[53] *Id.*

[54] *Id.*

[55] *Id.* at 34-35; *see also* Santangelo v. City of New York, 411 N.Y.S.2d 666 (N.Y. App. Div. 1978) Neither the minor nor his father were bound by a release signed by the father, which purported to exempt the city and the athletic league from liability for injuries. The father was not bound by the release because the derivative action "draws its life from the existence of the causes of action which inures to the benefit of the infant."

[56] J. WEISTART & C. LOWELL, THE LAW OF SPORTS 966 (1979).

[57] *Id.*

[58] *Id.*, *see also* U.C.C. § 1-201 (1987) ("a term is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it").

[59] G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 23, at 217-18.

[60] H. APPENZELLER, *supra* note 6, at 35.

[61] *See* Williams v. Cox Enterprises, 283 S.E.2d. 367 (Ga. Ct. App. 1981) (upheld waiver of liability covering running event since no factors necessary to void were present); *see also* Garretson v. United States, 456 F.2d 1017 (9th Cir. 1972) (upheld bar against action by ski jumper who signed release of liability to tournament sponsors and who previously had signed similar forms).

[62] *See id.*

against a school district or school that allows the athlete to participate despite contrary advice of a physician.[63] This is especially true when the athlete is a minor.[64] The waiver also must not be void as against public policy or under any of the other factors courts use to strike down the disfavored exculpatory agreements.[65]

The fact that liability waivers may be declared void is one important reason for wariness on the part of schools that allow medically unfit athletes to participate in interscholastic athletics.

III. THE RIGHT TO PLAY

Because waivers may inadequately protect schools against liability,[66] they may choose to disallow altogether participation in interscholastic athletics by medically unfit athletes. The student may, however, possess rights that would make this choice unavailable.

A. The Right to Due Process

The fourteenth amendment to the United States Constitution guarantees that no state may deprive a person of life, liberty, or property without due process of law.[67] This amendment applies only to state action, but it has been held that the regulations of schools and school districts pertaining to interscholastic athletic competition are subject to the due process clause.[68]

1. *Procedural Due Process*

If the school or school district institutes a policy barring from competition athletes that are medically unfit, determination of whether or not the athlete holds a property interest in participating will be critical in evaluating the procedural due process protections that will be afforded the athlete.

An athlete's interest in interscholastic athletic participation at the high school level is generally not considered a property right.[69]

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[63] *See supra* notes 28-66 and accompanying text.

[64] *See supra* notes 52-55 and accompanying text.

[65] *See supra* notes 56-60 and accompanying text.

[66] *See supra* notes 28-65 and accompanying text.

[67] U.S. CONST. amend. XIV, § 1.

[68] R. BERRY & G. WONG, *supra* note 15, at 55.

[69] *See* Scott v. Kirkpatrick, 237 So. 2d 652 (Ala. 1970) (speculative possibility of student acquiring college football scholarship no basis for finding student who was declared

At the intercollegiate level, however, the athlete generally does have a property right in such participation.[70] The difference in treatment stems from the fact that most college athletes receive a present economic value in the form of a scholarship.[71] The high school athlete has only the speculative potential for such a scholarship.[72] In certain limited cases, however, even high school students may have a property interest where the player has a very good chance of receiving a college scholarship in his or her sport.[73]

If no property interest is found, the athlete is not entitled to due process before being barred from participation. Conversely, if a property interest is found, the athlete is entitled to due process.[74]

2. *Substantive Due Process*

A key issue in substantive due process analysis is whether the challenged government action is inconsistent with a "fundamental" constitutional right.[75] The Supreme Court has denied that a fundamental constitutional right to education exists,[76] although some states have recognized it as a "fundamental right" under their state constitutions.[77] Even if a fundamental right to education were found to exist, the question still remains whether or not that right would include the right to participate in extra-curricular athletic activities.[78] The substantive due process concerns are discussed in conjunction with equal protection concerns, in the following section.

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ineligible after transfer was deprived of property right); *see also* Florida High School Activities Assoc. v. Thomas, 409 So. 2d 245 (Fla. Dist. Ct. App. 1982) (while participation in high school athletics is a privilege, the state cannot dispense with a privilege irrationally). Where there are no fundamental constitutional principles involved, government has great latitude over whom it will grant benefits. 2 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE 17.2 (1986) [hereinafter R. ROTUNDA].

[70] Gulf South Conf. v. Boyd, 369 So. 2d 553 (Ala. 1979).

[71] *Id.* at 556.

[72] *Id.*

[73] *See* Boyd v. Board of Dir. of McGhee School Dist., 612 F Supp. 86 (E.D. Ark. 1985) (student entitled to due process before coach could suspend him from team because of good chance to receive athletic scholarship).

[74] *See* Board of Regents v. Roth, 488 U.S. 564 (1972). *See generally* R. ROTUNDA, *supra* note 69, at § 13.5.

[75] R. BERRY & G. WONG, *supra* note 15, at 60.

[76] *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[77] *See, e.g.*, Serrano v. Priest, 135 Cal. Rptr. 345, 557 P.2d 929 (1976); Rose v. Council for Better Education, Inc., 790 S.W.2d 186 (Ky. 1989).

[78] See R. BERRY & G. WONG, *supra* note 15, at 61 (many courts interpret educational rights as encompassing only in-class learning).

B. *Substantive Claims*

1. *Equal Protection*

The fourteenth amendment also declares that no state shall deny any person equal protection of the laws.[79] Generally, the equal protection clause prohibits invidious discrimination. No individual or group may be singled out for disparate treatment unless it is the result of constitutionally permissible governmental action.[80]

If government action impedes a fundamental right, or discriminates among persons based on suspect criteria, strict scrutiny is used in reviewing the constitutionality of that action under due process or equal protection analysis, respectively [81] Since education generally does not implicate a fundamental right,[82] and since medically unfit student athletes are unlikely to be considered a suspect class[83] for equal protection analysis, it would be difficult for an athlete to claim that strict scrutiny should be applied in reviewing a school's decision to bar him or her from participating in interscholastic athletics.

If there is neither a suspect class nor a fundamental right involved, the government action need only be rationally related to a legitimate governmental purpose.[84] This is a much lower standard than strict scrutiny and an easier one for the government to meet.

When a school bars a medically unfit student athlete from participating, the governmental purpose appears to be two-fold. The school is concerned about its own liability if the athlete is injured,[85] but it also is concerned about the health, safety, and

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[79] U.S. CONST. amend. XIV, § 1.

[80] R. ROTUNDA, *supra* note 69, at § 14.1.

[81] R. BERRY & G. WONG, *supra* note 15, at 63. Strict scrutiny requires the rule to be supported by a compelling state interest—one with a value great enough to allow limitation of a fundamental right. R. ROTUNDA, *supra* note 68, at § 14.3.

[82] *See supra* notes 76-78 and accompanying text.

[83] *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1465-1553 (2d ed. 1988). Suspect classification has, for the most part, been limited to cases of race and alienage. Suspectness is based, among other things, upon how frequently the class is subjected to prejudice and discrimination.

[84] R. ROTUNDA, *supra* note 68, at § 14.3. In addition to the strict scrutiny and rational relationship tests, an intermediate scrutiny test exists. This test covers cases involving, most importantly, gender-based classifications. This test requires the law have substantial relationship to an important governmental interest.

[85] *See* Grube v. Bethlehem Area School Dist., 550 F Supp. 418, 424 (E.D. Pa. 1982) (school refused to allow athlete with one kidney to participate).

well-being of the athlete.[86] A rule barring the athlete from participating is rationally related to both of these legitimate state interests. If the athlete is medically unfit for interscholastic athletics, then allowing him to participate therein clearly would increase the school's potential for liability and increase the likelihood that the health of the athlete would be jeopardized. In addition, such a rule does not appear to trigger other equal protection concerns of underinclusiveness[87] or overinclusiveness.[88] The scope of the restriction strictly conforms to the scope of the problem.

2. *Rehabilitation Act*

A different analysis applies if the athlete is considered handicapped or disabled.[89] Section 504 of the Rehabilitation Act of 1973[90] makes it unlawful for anyone receiving federal funding to discriminate against otherwise qualified individuals on the basis of a handicap.[91] In *Poole v South Plainfield Board of Education*,[92] the parents of a handicapped child knew of the dangers involved in their child's participation in athletics when he had only one kidney. Indeed, the parents even encouraged his participation. The court stated that in such a case, the school district could not deny the student's right to participate.[93] The court also stated that the purpose of section 504 is to allow handicapped individuals to live life as fully as they are able without authorities determining what is too risky [94] In this case, two medical experts qualified the athlete

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[86] *Id.*

[87] An underinclusive rule is one that does not include all who are similarly situated with respect to a rule, and burdens less than would be logical to achieve the purpose. If a rule is underinclusive, it may be constitutionally infirm. *See* L. TRIBE, *supra* note 83, at 1447.

[88] An overinclusive rule is one that burdens those who would be spared if they had enough power to compel normal attention. *See id.*

[89] *See* Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (1982).

[90] *Id.*

[91] *Id.* Section 504 provides that

> No otherwise qualified, handicapped individual in the United States shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal Financial assistance.

[92] 490 F Supp. 948 (D.C.N.J. 1980) (high school student with one kidney allowed to participate in interscholastic wrestling despite school's objection).

[93] *Id.* at 951-53.

[94] *Id.* at 950.

to participate.[95] The court did not indicate how it would have ruled absent such medical clearance.

Athletes have been allowed to compete with one kidney,[96] one eye,[97] and various other handicaps, but only upon a showing of substantial medical evidence that no serious risk of further injury exists.[98] The courts in these cases have given greater weight to the medical recommendations and have decided that the school's concern for the safety of the athlete and for avoiding liability is outweighed by the medical testimony that an athlete could participate.[99]

The "otherwise qualified"[100] language of section 504 could be interpreted to mean that the athlete has been cleared to participate by a medical expert. If the athlete has been declared unfit to play, a school could argue that the athlete is not "otherwise qualified" and therefore can be barred from participating.[101]

3. *Other Substantive Grounds*

There are other grounds upon which an athlete might attack a school's decision to bar him from participation in interscholastic athletics. An athlete might successfully claim that the decision to bar his participation was not based on a "rational medical evaluation of the existence of a risk."[102]

An attack might be made on the ground that the relevant rules were promulgated by an athletic association rather than the school itself. Courts are reluctant, however, to overrule the rules and regulations of an athletic association that pertain to eligibility so long as the rules and regulations protect the athlete, promote education, and continue amateurism.[103]

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[95] *Id.* at 952. The clearance was given by the family physician and a doctor from a sports medicine center.

[96] *Grube*, 550 F Supp. 418.

[97] Wright v. Columbia Univ., 520 F Supp. 789 (E.D. Pa. 1981).

[98] *See Grube*, 550 F Supp. at 421 (testimony that the risk to the remaining kidney of the athlete is minute, almost nil).

[99] Spitaleri v. Nyquist, 345 N.Y.S.2d 878 (N.Y. Sup. Ct. 1973).

[100] 29 U.S.C. § 794 (1982). "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." *See also* Southeastern Comm. College v. Davis, 442 U.S. 397, 406 (1979).

[101] *Davis*, 442 U.S. at 406.

[102] *See Grube*, 550 F Supp. at 424 (school district's decision to prohibit an athlete's participation lacked a medical basis since the physicians relied upon did not have sufficient facts to allow for a rational medical evaluation).

[103] W CHAMPION, FUNDAMENTALS OF SPORTS LAW 295 (1990); *see Scott*, 237 So. 2d at 652.

Finally, the rules can be neither arbitrary nor irrational,[104] and are subject to a viable challenge if they are the "result of fraud, lack of jurisdiction, collusion, or arbitrariness."[105]

CONCLUSION

Many high school and college students foresee a major role for interscholastic athletics in their futures. The lure of financial reward may, however, lead some athletes to try to participate in the face of grave medical risks.[106] The schools these athletes attend have an interest both in protecting the health and safety of the athlete and in minimizing their own potential liability [107]

Such schools may attempt to require the athlete and his or her parents to sign a waiver of liability, or the schools may attempt to bar the athlete from participation altogether. There are risks that may leave the school exposed to liability under either course of action.[108]

No matter what course of action the schools take, they should insure that there is adequate instruction and proper medical attention and advice for the athletes. Simply minimizing the risks will aid in avoiding liability In the end, however, schools must always have the utmost concern for the well-being of the athlete. Athletes do not always make the best decisions.[109] Schools should be deliberate when allowing athletes to make these potentially life or death decisions.

Andrew Manno

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[104] *See supra* notes 80-88 and accompanying text.

[105] *Scott*, 237 So. 2d at 655.

[106] *See supra* notes 1-5 and accompanying text.

[107] *See supra* notes 85-86 and accompanying text.

[108] *See supra* notes 14-27 and 66-105 and accompanying text.

[109] Central Connecticut State University allowed Tony Penny to play basketball after he signed a liability waiver despite a heart irregularity. Penny collapsed and died during a professional game in England at the age of 23. Hank Gathers, a basketball star for Loyola Marymount University, collapsed during a game and died in March of 1990. Gathers had fainted in an earlier game and had been diagnosed as having a heart condition, but he continued to play. *See* Smith, *supra* note 5.